80-6671

RECEIVED
MAY 13 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAY 11 1981
Alexander L. Stevas, Clerk

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SHIRLEY TYLER,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

URSULA BENTELE
165 West End Avenue
New York, New York 10023

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether petitioner's death sentence was imposed in violation of the Due Process Clause where the court refused petitioner's request for a psychiatric evaluation prior to sentencing and failed, contrary to Georgia law, to advise the jury of petitioner's lack of a prior criminal record.

2. Whether the death penalty constituted cruel and unusual punishment as applied to petitioner, a woman accused of killing her husband, where the evidence indicated that the victim had physically abused both petitioner and her son.

3. Whether the failure to transcribe arguments of counsel unless petitioner could pay for the transcription deprived petitioner of due process and equal protection of the laws under the Fourteenth Amendment.

4. Whether petitioner's death sentence was imposed in an arbitrary fashion and under the influence of passion and prejudice where the prosecutor made himself an unsworn witness during argument and vouched for the propriety of his decision to seek the death penalty.

TABLE OF CONTENTS

	Page
Questions Presented	1
Citation to Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
How the Federal Questions Were Raised and Decided Below	10
Reasons for Granting the Writ	12
I. PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE DUE PROCESS CLAUSE WHERE THE SENTENCING JURY LACKED EVEN THE MOST BASIC INFORMATION ABOUT PETITIONER, INCLUDING A PSYCHIATRIC REPORT AND THE FACT THAT SHE HAD NO PRIOR CRIMINAL RECORD	12
II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEATH PENALTY CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT AS APPLIED TO PETITIONER, A WOMAN ACCUSED OF KILLING HER HUSBAND, WHERE THE EVIDENCE INDICATED THAT THE VICTIM HAD PHYSICALLY ABUSED BOTH PETITIONER AND HER SON	17
III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA LAW PROVIDING THAT ARGUMENTS OF COUNSEL ARE NOT TRANSCRIBED EXCEPT WHEN A PARTY OFFERS TO PAY FOR SUCH TRANSCRIPTION, DEPRIVED PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT	19
IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN AN ARBITRARY FASHION AND UNDER THE INFLUENCE OF PASSION AND PREJUDICE WHERE THE PROSECUTOR MADE HIMSELF AN UNSWORN WITNESS DURING ARGUMENT AND VOUCHED FOR THE PROPRIETY OF HIS DECISION TO SEEK THE DEATH PENALTY	21
Conclusion	22
Appendix A, Opinion of the Georgia Supreme Court	
Appendix B, Georgia Statutory Provisions Involved	
Appendix C, Petition for Psychiatric Examination	
Appendix D, Motion for Complete Recordation of all Proceedings	

TABLE OF AUTHORITIES

Cases	Page
Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978)	18
Berger v. United States, 295 U.S. 78 (1935)	22
Bush v. McCollum, 231 F. Supp. 560 (D.C. Tex. 1964)	15
Coppedge v. United States, 369 U.S. 438 (1968)	14
Dix v. State, 238 Ga. 209, 232 S.E.2d 47(1977)	18
Draper v. Washington, 372 U.S. 487 (1963)	19
Furman v. Georgia, 408 U.S. 238 (1972)	10, 18
Gardner v. Florida, 430 U.S. 349 (1977)	21, 22
Gideon v. Wainwright, 372 U.S. 335 (1963)	14
Godfrey v. Georgia, 446 U.S. 420 (1980)	10, 17
Gregg v. Georgia, 428 U.S. 153 (1976)	10, 15, 21
Griffin v. Illinois, 351 U.S. 12 (1956)	14, 20
Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977)	19
Jackson v. State, 229 Ga. 191, 190 S.E.2d 530 (1972)	20
Lockett v. Ohio, 438 U.S. 586 (1978)	10, 12, 13
Lyle v. State, 131 Ga. App. 8, 205 S.E.2d 126 (1974)	20
McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974)	18
McGarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951)	14
Montgomery v. State, 140 Ga. App. 286, 231 S.E.2d 108 (1976)	20
Mumsford v. State, 129 Ga. App. 547, 199 S.E.2d 843 (1973)	20
Newell v. State, 237 Ga. 488, 228 S.E.2d 873 (1976)	20
Newman v. State, 239 Ga. 329, 236 S.E.2d 673 (1977)	20

Page

Cases

Payne v. Thompson, 622 F.2d 254 (6th Cir. 1980) 14

Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975)..... 19

Roberts v. Louisiana, 428 U.S. 325 (1976)..... 12

Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976)..... 18

Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980) 21

Tyler v. State, ____ Ga. ____, ____ S.E. 2d ___ (1981)..... 1, 10

United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953)..... 14

United States v. Taylor, 437 F.2d 371 (4th Cir. 1971)..... 14

Watts v. State, 141 Ga. App. 127, 232 S.E.2d 590 (1977)..... 20

Woodson v. North Carolina, 428 U.S. 280 (1976) 12

Young v. Ricketts, 242 Ga. 559, 250 S.E. 2d 404 (1978)..... 16

Statutes

Ga. Code Ann. §6-805 19

Ga. Code Ann. §27-2401 19

Ga. Code Ann. §27-2503 ..... 15, 16

Ga. Code Ann. §27-2534.1(b)(7) 10, 17

Ga. Code Ann. §27-2537(c) 20

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SHIRLEY TYLER,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered on February 11, 1981.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at ___ Ga. ___, ___ S.E.2d ___ (1981) and is set out in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 11, 1981 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner asserting deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

"Excessive bail shall not be required,

> nor excessive fines imposed, nor cruel and unusual punishments inflicted,"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

This case also involves provisions of the Code of Georgia, the text of which are set out in Appendix B hereto.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on February 11, 1981, affirming petitioner's conviction of murder and sentence to death by a Pike County jury on December 4, 1979. Petitioner, Shirley Tyler, was sentenced to die upon her conviction of the murder of her husband.

At the time of petitioner's arraignment, her court-appointed attorney moved for a psychiatric examination, asserting that he had reason to believe that his client might be incompetent to stand trial and further requesting the assistance of a psychiatrist to inquire into matters affecting petitioner's criminal responsibility at the time of the offense. The motion for such a psychiatric examination was denied by Judge Ben Miller.*/

Trial counsel again made a request for a psychiatric evaluation of petitioner after the jury found her guilty and prior to sentencing, stating:

---

*/ A copy of counsel's Petition for Psychiatric Examination is annexed hereto as Appendix C. This copy is unsigned; according to the attorney's brief to the Supreme Court of Georgia, the motion was served and ruled upon on the merits by Judge Miller (Brief, pp. 1-2).

> MR. BISHOFF [defense counsel]: Your Honor, if I may, in dealing with Mrs. Tyler, it's come to our attention I don't know that she has the mental capability of really understanding what she's done, or what has happened here. I think during our work with her, she's had problems understanding very basic questions. She's been incoherent at times. And I really think that she deserves some type of psychiatric analysis or examintion prior to sentencing.

(T. 318)*/ The application was again denied.

Petitioner was found guilty of killing her husband, James Wilson Tyler, by poisoning him with about one-half teaspoon of Phoskil, a pesticide spread around her house by the victim's mother (T. 143, 177, 230). On the evening James Tyler died, his father, William Tyler, had come to visit him from his home next door. The elder Mr. Tyler testified that he was present when James ate a bowl of chili brought in by his wife, petitioner Shirley Tyler (T. 91-92). About an hour later, James came to his father's house to use the telephone, but became ill, with excessive sweating, stomach pains, inability to control his bowels and weakness of the muscles (T. 93-95). He was carried out to a family car and apparently died en route to the hospital (T. 96-98).

James Tyler had been ill twice during the previous month with symptoms similar to those he exhibited the night he died (T. 77, 84, 93). Both times he was taken to Upson County Hospital, where Dr. David P. Fieseler diagnosed him, on the first occasion, as suffering from viral gastroenteritis, a disease which ran a normal course after two days' stay at the hospital (T. 124-125). Two weeks later, on October 2, 1979, Mr. Tyler was again admitted to the hospital, diagnosed now as having suffered a cerebral hemorrhage (T. 126-130). Since Mr. Tyler did suffer from high blood pressure, one of

---

*/ Numerals preceded by "T" refer to the transcript of trial, comprising a total of 346 pages.

the possible causes of a cerebral hemorrhage, this condition was treated with medication after his hospitalization (T. 135, 153). Although the prosecutor stated in his argument to the jury urging the death penalty that petitioner had poisoned the victim three times (T. 323), Dr. Fieseler specifically testified that there was no physical evidence of poisoning on the first two occasions (T. 149-151).

At the time of these previous illnesses, it was petitioner who summoned help for her husband, going with him to the hospital and remaining at his side, apparently very concerned for his welfare, until he recovered (T. 100-102, 118-119, 155). When petitioner's husband died, and the doctor expressed doubts about the cause of death, petitioner immediately consented to an autopsy, saying that she, also, wished to know the reason for his death (T. 116-117, 155). The autopsy revealed the cause of death as parathion poisoning;half a teaspoon of Phoskil, in which the active ingredient is parathion, would be lethal, and the poison could have entered the victim's system through ingestion (no analysis was done of the contents of the stomach), inhalation, or even by absorption through the skin (T. 141-142, 155-156, 158, 168).

When the presence of parathion in Mr. Tyler's body became known, the authorities began to investigate the possibility of a deliberate poisoning . Special Georgia Bureau of Investigations Agent Daniel Greene interviewed petitioner and members of her family on several occasions, ascertained that Phoskil had been spread throughout the Tylcr home as a pesticide, and finally became suspicious that petitioner had poisoned her husband (T. 170-173, 176-177, 181). After questioning petitioner in detail on two separate occasions, Agent Greene obtained a written statement in which petitioner said:

> Yes i did it he was going to hurt my son Tony and i not stand this because he hurt him once before and i give him a little tea spoon full in is chilli & beans. His mother put in draw and i git a little of this out of the draw. */
>
> State Exhibit Number 7, T. 343

Initially, according to Agent Greene, petitioner had said that her husband might have gotten the poison into his body by rolling around on the floor (T. 176); at trial petitioner testified that her husband had been depressed for some time prior to his death, and that he had asked her to give him some of the poison (T. 246-248). She finally agreed to scrape some into a teaspoon, but denied placing it in any food (T. 252). She said that the little bit in the spoon would not have been enough to kill him (T. 269). Petitioner also stated that her husband had boasted of being able to survive after eating glass, and walking away inexplicably unharmed from car accidents (T. 234-235).

Petitioner's eldest son, Tony, whom she bore before her marriage to James Tyler, corroborated her statement that the victim had struck him at least twice, once on the day he died (T. 283-288). In her own testimony, petitioner stated that her husband had been a heavy drinker who often became violent, on one occasion knocking out her teeth and another time almost killing her, leading her to move out and contemplate a divorce**/ (T. 233, 255). She testified that she had him arrested each time he became violent (T. 233). The

---

*/ The trial court, after a Jackson-Denno hearing, found the statement to have been voluntarily made (T. 199-200).

**/ In response to the prosecutor's questions, petitioner agreed that she had seen another man, stating that her relationship with him occurred during this separation from her husband.

victim's sister and father both admitted that James Tyler had a drinking problem (T. 102, 120). When asked whether the victim beat his wife and children, his father said: "I ain't seen him do it" (T. 102-103) and his sister replied: "I never been around him, to do that." (T. 120).

Closing arguments were not transcribed, despite counsel's pretrial motion for complete recordation,*/ except for an objection raised by the prosecutor during defense counsel's summation (T. 297-298). The trial court refused to order a full transcript unless petitioner offered to pay for the argument of counsel (T. 71).

Before his charge to the jury, the court asked the defense attorneys "to help me understand what this woman's defense is. . ." (T. 292) Expressing his confusion about the various statements made by petitioner, both before trial and during her testimony, the judge said:

> "I'm at a complete loss, from her statement, to know exactly what she contends. Does she contend, under the statement, that she killed him to keep him from harming the child? Does she contend that he poisoned himself? Does she contend that some third party did it, unknown to us?
>
> I've got to know to charge this Jury, and I can't tell what the woman contends about it."
>
> T. 293-294

Defense counsel, noting that their request for a psychiatric examination had been denied, said that they had similar difficulties ascertaining what petitioner's position

---

*/ A copy of counsel's motion is annexed hereto as Appendix D.

was, and even what she meant by some of her rather incoherent statements (T. 294-295). The court decided to instruct the jury on all the defenses to which petitioner had alluded (T. 295-297). The jury found petitioner guilty of murder, the only crime submitted for their consideration (T. 317).

In response to the court's question: "Does the defendant have anything to offer in mitigation of punishment?" defense counsel again made a request for a psychiatric examination. The judge ruled: "That's out of my hands at this stage. What I'm asking is do you have any evidence you want to present to this Jury, in mitigation of punishment." The attorney replied that he did not, and the sentencing proceeding consisted exclusively of the arguments of counsel (T. 318).

The prosecutor began his argument to the jury in favor of the death penalty by explaining that they would have to find an aggravating circumstance under Georgia law before they could impose the death penalty. He expressed his disagreement with this requirement, saying: "I think that to take the life of anybody is aggravated enough in itself." (T. 319) He went on to discuss the aggravating circumstances alleged in the case, namely taking a life for the purpose of receiving money*/ and committing a murder involving torture (T. 320).

---

*/ The victim apparently carred a $15,000 life insurance policy through his employment. However, petitioner testified, and the records at the victim's job corroborated, that petitioner was unaware of this policy until after her husband's death, knowing only of a $500 policy he carried personally (T. 242-244). The jury failed to find this aggravating circumstance, relying solely on the "torture" provision (T. 336).

In connection with his argument that this killing was particularly horrible and inhuman, the prosecutor referred to other cases he had tried, giving details of their facts and noting that he had talked about these other homicides in his closing argument during the trial (T. 322). He then impressed upon the jury that he was the sole person with authority to seek the death penalty in a given case, telling them that he did not take this decision lightly, that he had to do

> "some soul-searching too. I have to consider, number one, the law, as you do; the facts of the case; and then, of course, I have to consider the human reason -- humanitarian. When I considered the facts of this case, and the law, and what I knew about it, I reached that decision. It's not one that you reach lightly; it's one that you have to think about."
>
> (T. 323-324)

He concluded with the argument that petitioner did not deserve mercy becuase she showed no mercy to her husband, stating "if you think she didn't show any mercy to James Tyler, then under the law of this State, you are sworn to return a verdict of death, and in this case I ask you to do so." (T. 327)

The court's instructions to the jury at the sentencing phase, comprising four pages of the transcript (T. 331-335), failed to define any of the terms of the statutory aggravating circumstances, simply paraphrasing the statute by saying that death could be justified if "the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind to the victim (sic)." (T. 333) The court also failed to call to the jury's attention any mitigating circumstances, such a petitioner's lack of a prior record*/ and the evidence suggesting that she and her children may have been abused by her husband.

---

*/ In the judge's report after the sentence, he notes that petitioner had no prior record. (See, Question 24).

After deliberating from 1:40 p.m. to 3:20 p.m., the jury returned a verdict sentencing petitioner to death, finding as an aggravating circumstance "inhuman torture." It declined to find the other aggravating circumstance submitted, that the killing was committed for money or any other thing of value (T. 336).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Counsel for petitioner raised the federal arguments challenging the death penalty as applied in this case in his brief to the Supreme Court of Georgia, specifically citing this Court's opinion in Godfrey v. Georgia, 446 U.S. 420 (1980)(Brief for Appellant, pp. 10-12). The Georgia Supreme Court addressed both the facial validity of Ga. Code Ann. §27-2534.1(b)(7) and its application to petitioner's case, finding no infirmity in her sentence and distinguishing the facts of Godfrey (Tyler v. State, __Ga. __, __ S.E.2d ___, slip opinion, pp. 11-13, 13-15).

2. In his third enumeration of error to the Supreme Court of Georgia, counsel asserted:

> The trial court erred in allowing the jury to arbitrarily and capriciously inflict the death sentence upon the appellant.

The Supreme Court of Georgia found that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The court further held that "the similar domestic murder cases listed in the appendix support the affirmance of the death penalty." Tyler v. State, slip opinion,pp. 13, 16. The court's review necessarily incorporated consideration of whether the procedures used in imposing the death penalty on petitioner complied with this Court's rulings in Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976) and Lockett v. Ohio, 438 U.S. 586 (1978). The appellate review approved in Gregg, supra, assumes that the Georgia Supreme Court took note specifically that 1) the trial court denied petitioner a psychiatric evaluation, despite two requests by trial counsel stating that he had difficulty communicating with his client; 2) the transcript omitted the summations of

counsel at the end of the guilt phase of the proceedings, despite trial counsel's request for complete recordation and 3) the prosecutor's argument in favor of the death penalty urged the jury to impose death based on improper considerations. In addition, counsel raised the question of the denial of a psychiatric examination in his brief to the Supreme Court of Georgia, although he did not specifically enumerate it as an error (Brief for Appellant, pp. 1-2).

REASONS FOR GRANTING THE WRIT

I

PETITIONER'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE DUE PROCESS CLAUSE WHERE THE SENTENCING JURY LACKED EVEN THE MOST BASIC INFORMATION ABOUT PETITIONER, INCLUDING A PSYCHIATRIC REPORT AND THE FACT THAT SHE HAD NO PRIOR CRIMINAL RECORD.

In a capital case, the Constitution requires that the character and record of the defendant be considered by the sentencing authority when deciding whether the offender is to live or die. Woodson v. North Carolina, 428 U.S. 280, 304-305 (1976). A mandatory sentencing scheme, even one refined to take account of specified aggravating circumstances, will not pass constitutional muster. Roberts v. Louisiana, 428 U.S. 325 (1976). Nor can a state limit the relevant mitigating factors to be considered by the sentencing body in its determination regarding the appropriateness of the death sentence for a given offender. Lockett v. Ohio, 438 U.S. 586 (1978). The requirement, of constitutional dimension at least in cases involving the death penalty,that the sentencing process include full consideration of the individual offender's character and prior record was not fulfilled in petitioner's case. Accordingly, her death sentence should be vacated and the case remanded.

a) The trial judge erred in refusing petitioner's request for a psychiatric evaluation as part of the pre-sentence proceeding.

Petitioner was on trial for her life. At her arraignment, court-appointed counsel had requested a psychiatric examination to determine her competence and to investigate the possibility that she lacked criminal responsibility because of a mental condition. That application was denied. Now petitioner had been found guilty of a capital offense, and the jury was charged with the task of deciding whether

she should live or die. At this point, counsel again requested a psychiatric evaluation to assist the jury in making its decision. Again he noted the difficulties he had experienced communicating with his client and the doubts he had about her understanding of the proceedings. The judge, despite the fact that he himself had been "at a complete loss" as to what petitioner's defense had been from her testimony and her various statements (T. 292-294), again refused the request. The death sentence imposed on petitioner by a jury totally uninformed about her psychiatric background and mental condition at the time of the offense violates the Due Process Clause of the Fourteenth Amendment and constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

The judge's denial of petitioner's request for a psychiatric examination*/ made it impossible for this indigent defendant to present to the jury psychiatric testimony in mitigation of the offense. This action prevented the jury from considering mitigating evidence exactly as though the categories of mitigating evidence had been severely limited, a procedure this Court has found constitutionally impermissible. Lockett v. Ohio, 438 U.S. 586 (1978). The opportunity to hear all relevant mitigating circumstances is hollow indeed where the means of presenting such evidence is thwarted by the court's denial of so basic a tool as a psychiatric evaluation.

---

*/ The court disposed of counsel's application with the statement: "That's out of my hands at this stage." The judge did not explain why this was so, but made it clear that he would not order an examination (T. 318).

This Court's opinion in United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953) supports the conclusion that, at the very least, psychiatric evidence should have been available at some point before petitioner's death sentence was pronounced. While refusing to announce a constitutional requirement that the aid of a psychiatrist should have been afforded to an indigent capital defendant before he entered his guilty plea,*/ the Court emphasized that a court-appointed psychiatrist and two psychiatrists called by the defense did testify at Smith's pre-sentence hearing, where the issue of his sanity was heard by the trial court. United States ex rel. Smith v. Baldi, supra, at 568. Similarly, in McGarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951), cited with approval in Smith, two psychiatrists had examined the defendant on the question of his mental state (pursuant to a Massachusetts law requiring psychiatric examination in all capital cases), leading the court to conclude that the Constitution did not require a further examination, at state expense, by the defendant's own doctor. The fact that such additional examination, or examination by a particular doctor of the defendant's own choosing [see Payne v. Thompson, 622 F.2d 254 (6th Cir. 1980)], must not be provided by the state in no way sanctions the denial of any psychiatric examination whatever.

---

*/ Even this holding may be questioned after the Court's subsequent rulings in Griffin v. Illinois, 351 U.S. 12 (1956), Gideon v. Wainwright, 372 U.S. 335 (1963) and Coppedge v. United States, 369 U.S. 438 (1968); see United States v. Taylor, 437 F.2d 371, 383 n.6 (4th Cir. 1971)(Sobeloff, conc.).

The need for a psychiatric evaluation of petitioner was particularly acute in view of her lawyers' difficulties in communicating with her, in view of her often rambling and incoherent testimony, and in view of the nature of the offense itself. See Bush v. McCollum, 231 F. Supp. 560 (D.C. Tex. 1964), aff'd 344 F.2d 672 (5th Cir. 1965). Petitioner's motivation, if she did intend to kill her husband, was far from clear. It appeared that James Tyler had physically abused his family on many occasions, and while such conduct would not necessarily constitute a justification defense, it might surely have affected petitioner's psychological state at the time of the offense. Given the likelihood that a psychiatric evaluation might have given some insights to be considered in mitigation, and since petitioner had made timely requests for such examination, its refusal in a death case constitutes error of constitutional magnitude. Accordingly, petitioner's death sentence should be vacated.

b) Petitioner's death sentence was imposed in violation of the Due Process Clause where, contrary to the specific mandate of Georgia law, the court failed to apprise the jury of petitioner's lack of any prior criminal record.

Georgia's capital sentencing procedures were upheld by this Court with specific reliance on the statutory provision requiring that the jury "shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas . . ." [Ga. Code Ann. §27-2503 (emphasis added); Gregg v. Georgia, 428 U.S. 153, 163-164 (1976)]. As the Court recognized, it is uniquely important in a death penalty case for the jury, where it is the sentencing authority, to possess accurate information about the offender in order to make a rational decision about whether he is to live or die. Gregg v.

Georgia, supra, at 190, 203-204.

Experienced trial judges imposing sentences on defendants in courts throughout the country routinely have available to them the offender's criminal record. Indeed, it would seem unthinkable for a judge to pass sentence without such basic information. Yet here, a lay jury, making what was probably its first sentencing decision, did not have available to it the fact that petitioner had no prior criminal record. And the jury which was unaware of this fundamental aspect of petitioner's background was deciding, not whether petitioner should serve five, ten or fifteen years in prison, but whether she should live or die. A sentencing procedure in a capital case which permits a jury to impose the death sentence without any knowledge of the offender's criminal background cannot pass constitutional muster.

The Georgia legislature apparently recognized the critical importance of information about the criminal record of an offender when it enacted Ga. Code Ann. §27-2503, which singles out such information as required to be brought before the judge or jury before sentencing. In petitioner's case, the statute was clearly violated, since petitioner's lack of any criminal convictions was at no time brought to the jury's attention. Cf. Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978)(counsel brought out fact of defendant's lack of any prior record except traffic infractions during the trial*/). Such disregard of the mandatory language of the law governing capital sentencing as it was approved in Gregg requires that petitioner's death sentence be vacated.

---

*/ Petitioner's trial counsel adduced no evidence regarding the fact that petitioner had no record. If it was counsel's obligation to present this fact to the jury (and we submit that obligation was the court's), the omission must constitute a strong argument that petitioner was deprived of the effective assistance of counsel in this case.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEATH PENALTY CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT AS APPLIED TO PETITIONER, A WOMAN ACCUSED OF KILLING HER HUSBAND, WHERE THE EVIDENCE INDICATED THAT THE VICTIM HAD PHYSICALLY ABUSED BOTH PETITIONER AND HER SON.

Shirley Tyler was sentenced to die for killing her husband. The only aggravating circumstance found by the jury was that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. §27-2534.1(b)(7). None of the terms used in this statutory provision was defined for petitioner's jury. The court did not instruct the jurors to focus on the individual characteristics of the defendant, nor did it define the term "mitigating circumstances" or give any concrete examples of mitigating circumstances suggested by the evidence. The court's perfunctory instructions failed to give the jury adequate guidelines to ensure that it would not impose the death penalty in an arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Under the facts of petitioner's case, the death penalty was not warranted and should be set aside.

Petitioner's situation was in several respects comparable to the facts in Godfrey v. Georgia, 446 U.S. 420 (1980), where this Court held unconstitutional the application of the Georgia code section at issue here to the shotgun killing by the defendant of his wife and mother-in-law. Both cases involved the killing of a spouse after a history of marital difficulties that had previously erupted into violence. The most striking difference is the means of causing death. The prosecution in petitioner's case argued, with some force,

that poisoning does involve torture in that death is not instantaneous and involves considerable physical suffering. On the other hand, it was far from clear that petitioner sought to cause such suffering, unlike in the other "torture" cases distinguished in Godfrey.*/ Was not the poison simply the means that happened to be at hand and within petitioner's capacity, physically and perhaps psychologically, to employ? If such is the case, surely petitioner should not be exposed to the death penalty because she did not have access to a gun to do the job efficiently and quickly.

The cases cited by the Supreme Court of Georgia as "comparable" to petitioner's, thus demonstrating the absence of arbitrariness or caprice, are perhaps the best indication that petitioner's death sentence does constitute cruel and unusual punishment. The first three cases were reversed under Furman v. Georgia, 401 U.S. 238 (1972). Smith v. State, 236 Ga.12 222 S.E.2d 308 (1976) and Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978) both involved the killing of a spouse or former spouse for the purpose of obtaining insurance proceeds, a motive which petitioner's jury specifically declined to ascribe to her. And in Dix v. State, the defendant strangled slashed and cut his former wife in various parts of her body before finally killing her by stabbing her through the heart. It is respectfully submitted that petitioner's case is so dissimilar from this group of "similar" cases as to present a strong argument on that basis alone for declaring petitioner's death sentence cruel and unusual.

---

*/ See e.g., Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977) (defendant strangled, slashed and cut various parts of his former wife's body before killing her by stabbing her through the heart); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974)(defendant beat, whipped, burned, bit and cut bound victim, put salt on her wounds, sexually abused her and then strangled her).

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA LAW PROVIDING THAT ARGUMENTS OF COUNSEL ARE NOT TRANSCRIBED EXCEPT WHEN A PARTY OFFERS TO PAY FOR SUCH TRANSCRIPTION, DEPRIVED PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

The transcript of petitioner's trial does not include the opening and closing statements of counsel at the conclusion of the trial. Under Georgia law, petitioner, who is indigent, is not entitled to have these parts of the trial recorded and transcribed, although a defendant with money could require that the arguments be taken down by the stenographer and transcribed for possible use on appeal.*/ Trial counsel's motion for complete recordation of the proceedings in petitioner's case was denied as it applied to arguments of counsel.**/

Petitioner, an indigent defendant faced with a capital charge, must under the Georgia system pursue her appellate remedies hampered by an incomplete transcript of her trial, one which omits the often critical summation of the prosecutor. The Supreme Court of Georgia has on several occasions set aside death sentences because of improper arguments by the prosecutor, even where no objection was registered by trial counsel. See, e.g., Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977). Indeed, under its mandatory sentence review, the Georgia Supreme Court is required to determine whether the death sentence was imposed under the influence of passion,

---

*/ The relevant sections of the Code of Georgia are set forth in Appendix B. See Ga. Code Ann. §6-805 and §27-2401.

**/ Counsel's pre-trial motion is annexed hereto as Appendix D. The court's ruling, refusing to order the recording of arguments of counsel unless petitioner would pay for them, appears at T. 71.

prejudice, or any other arbitrary factor [Ga. Code Ann. §27-2537(c)], a task that would appear impossible without reviewing the arguments of the prosecutor. Petitioner in this case is foreclosed from raising the issue of improper remarks by the prosecutor unless she can meet the burden of reconstructing the record to demonstrate prejudice.*/ She has clearly not been afforded "as adequate and effective an appellate review as that given appellants with funds." Draper v. Washington, 372 U.S. 487, 496 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). Petitioner was therefore deprived of due process and denied equal protection of the law by being forced to perfect her appeal without a complete record of the trial court proceedings.

Petitioner maintains that access to a complete transcript is a necessary prerequisite to a meaningful appeal in a case in which the death penalty was imposed. Even if, however, the Court declines to announce a per se rule to that effect, petitioner's death sentence in this case should be vacated because of the indications in the record that improper remarks may well have been made to this jury. In his argument at the sentencing phase, which was transcribed, the prosecutor specifically referred to what " . . . I told you, in my closing argument before, that I had tried numerous homicides . . ." (T. 322), indicating that his summation had included at least some of the objectionable material of his penalty argument (see Point IV below for a more detailed analysis of the impropriety of the prosecutor's argument in favor of the death penalty.)

---

*/ Georgia appellate courts have consistently affirmed convictions in the face of allegations of improper prosecutorial remarks where the appellant had not bought the transccript and could not reconstruct the record. See e.g., Newman v. State, 239 Ga. 329, 236 S.E.2d 673 (1977); Newell v. State, 237 Ga. 488, 228 S.E.2d 873 (1976); Jackson v. State, 229 Ga. 191, 190 S.E.2d 530 (1972); Watts v. State, 141 Ga. App. 127,232 S.E.2d 590 (1977); Montgomery v. State, 140 Ga. App. 286, 231 S.E.2d 108 (1976); Lyle v. State, 131 Ga. App. 8, 205 S.E.2d 126 (1974); Mumsford v. State, 129 Ga. App. 547, 199 S.E.2d 843 (1973).

Under these circumstances, the record before the Supreme Court of Georgia was inadequate to that court's task, as defined by the statute upheld in Gregg v. Georgia, 428 U.S. 153 (1976), of determining that the death penalty was not imposed under the influence of passion or prejudice. See Gardner v. Florida, 430 U.S. 349 (1977) ; Stephens v. Zant, 631 F.2d 397, 403 (5th Cir. 1980).*/ Petitioner's death sentence should therefore be vacated and the case remanded.

IV

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S DEATH SENTENCE WAS IMPOSED IN AN ARBITRARY FASHION AND UNDER THE INFLUENCE OF PASSION AND PREJUDICE WHERE THE PROSECUTOR MADE HIMSELF AN UNSWORN WITNESS DURING ARGUMENT AND VOUCHED FOR THE PROPRIETY OF HIS DECISION TO SEEK THE DEATH PENALTY.

In the penalty portion of his argument to the jury**/ the prosecutor told the jury about other homicides he had tried, compared their facts to petitioner's case, assured the jurors that petitioner's offense warranted the death penalty, which he decided to seek only after long soul-searching, and admonished them that they were "sworn to return a verdict

---

*/ Unlike in Stephens, supra, the jurors here were not specifically instructed (as they were twice in Stephens) to base their decision only on facts and inferences in evidence. Stephens v. Zant, supra, at 403.

** / The summation at the close of the trial, which was not transcribed, apparently contained further improper remarks. See Point III above.

of death" if they thought petitioner showed no mercy to her husband. Such arguments to a jury by the prosecutor, whom jurors generally see as an impartial servant of justice, are improper and highly prejudicial. See Berger v. United States, 295 U.S. 78, 88 (1935). And in a capital case, where the Constitution imposes the additional requirement that the sentencing decision be a reasoned judgment following a proceeding complying with due process standards [Gardner v. Florida, 430 U.S. 349, 357-358 (1977)], the prosecutor's intrusion of his personal opinion of the propriety of the death sentence based on his own professional knowledge and experience is particularly dangerous and inconsistent with the principles of individualized sentencing as announced by this Court.

CONCLUSION

Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

Ursula Bentele.

URSULA BENTELE
165 West End Avenue
New York, New York 10023

ATTORNEY FOR PETITIONER

DATED: May 11, 1981

APPENDIX A

In the Supreme Court of Georgia

Decided: FEB 11 1981

36671. TYLER v. THE STATE.

MARSHALL, Justice.

This is a death case. The appellant, Shirley Tyler, was convicted of the murder of her husband by a Pike County jury. The jury found one aggravating circumstance and sentenced the appellant to death. The case is before us on direct appeal and for mandatory review of the death sentence.

The evidence presented at trial follows:

The appellant and the victim lived next door to the victim's father, William Tyler. On September 18, 1979, the appellant sent her son to William Tyler's home to inform the victim's parents that the victim was seriously ill. Going next door, William Tyler found his son lying face down on the floor of his bedroom. The victim was wet with perspiration, calling for ice water and requesting that a fan be turned on him. William Tyler testified that his son was foaming at the mouth and attempting to vomit, that he could not control his bowels, and was complaining of a burning abdominal pain. The victim

was unable to stand or to otherwise control his muscles, and he had to be carried to the car which transported him to the hospital. There, the victim's condition was diagnosed as a viral infection. He stayed in the hospital for a few days and then returned to work upon release.

On October 3, 1979, the victim's son again informed William Tyler that the victim was ill. Upon investigation, William Tyler discovered the victim lying on the floor, complaining of the same symptoms he had exhibited before. The victim was again admitted to the hospital, where this time his illness was diagnosed as a cerebral hemorrhage. However, neurological tests proved this diagnosis to be inaccurate. After a few days in the hospital, the convulsive seizures which the victim had initially experienced subsided. Headache and high-blood-pressure medications were prescribed, and the victim was released. At trial, the victim's attending physician testified that, within a week of the victim's release from the hospital, he exhibited few of the debilitating symptoms. However, the victim was not well enough to return to work.

On October 22, 1979, in the presence of William Tyler, the victim ate a large bowl of chili, which the appellant had

prepared. Approximately an hour later, the victim staggered over to his father's home, exhibiting symptoms identical to those displayed on the two previous occasions. The victim died en route to the hospital.

An autopsy disclosed that the victim died from a fatal ingestion of the chemical parathion. Subsequently, the attending physician inquired of the appellant whether the victim had come in contact with any poison or chemical. The appellant replied that he had not. Upon further inquiry, the appellant stated that the victim's mother had given them some rat poison marketed under the brand name Phoskil. Parathion is the active ingredient in Phoskil.

Expert testimony presented at trial showed that parathion is a toxic pesticide not recommended for use in households. The fatal dose of parathion is approximately half of one teaspoon. The poison can either be ingested or inhaled or it may even enter the body through the skin.

The chemical had been sprinkled around the victim's house as a pesticide. Two of the victim's children were tested and found to have an almost negative amount of parathion in their bodies. Expert testimony illustrated that it is possible, but

unlikely, for a human to ingest a fatal dose of parathion through the skin.

When initially interviewed by authorities, the appellant stated that the victim probably came in contact with the poison by rolling around on the floor. She admitted in these initial interviews that the victim had eaten shortly before each attack. In a third interview, which occurred in the sheriff's office prior to arrest, the appellant admitted that she had scraped a spoonful of poison out of the cabinet drawer and had mixed it with the chili that the victim had eaten immediately prior to his death. She stated that her motive for killing her husband was to prevent him from hurting her son. Testimony from the appellant's son showed that the victim had hit the child only twice; once "a long time ago" and again on the night of his death. The state also presented evidence that the appellant had been, from time to time, involved with another male, and, in fact, had been out with him on the day of her husband's funeral.

The appellant admitted to investigators that her husband had a life insurance policy, but stated that the value of the policy was only $500. It was later determined by GBI investi-

gators that the actual value of the policy was $15,000.

At trial, the appellant testified that the victim had been despondent and had administered the poison to himself by mixing it in a glass of orange juice. The appellant stated that the victim believed himself to be invincible and was prone to eating glass and other harmful objects to illustrate this belief.

The victim apparently had been in good health prior to this series of illnesses. The state presented testimony by both the victim's doctor and family that the victim appeared normal, had not been dejected, and had been generally in good spirits with the exception of these recurring illnesses.

Other evidence will be examined in more detail in addressing each of the appellant's enumerations of error.

1. The appellant first urges the general grounds. We find that the evidence in this case supports the conclusion that a rational trier of fact could find the appellant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). Therefore, this enumeration is without merit.

2. Next, the appellant argues that she did not freely and voluntarily make the statement in which she confessed to

poisoning her husband.

As stated above, the appellant was interviewed on three separate occasions. On the first occasion, the authorities were merely attempting to determine how the victim came in contact with the poison. At this time, the appellant made no incriminating statements. During the second interview, the authorities focused their investigation upon the appellant, and advised her of her constitutional rights. The appellant made no incriminating statements on this occasion. On the third occasion, the GBI agent investigating the case advised the appellant of her rights; subsequently, the appellant signed a waiver form. At this time, she made a written statement, to wit: "Yes, I did it. He was going to hurt my son, Tony, and I'll not stand for this, because he hurt him once before, and I gave him a little teaspoon in his chili and beans. His mother put it in a drawer and I scraped a little of this out of the drawer." The appellant's attorney objected to the introduction of this statement, arguing that it was inadmissible in that it was the result of a promise of a benefit or a hope of reward. We do not agree.

At trial, the GBI agent testified that, during the third interview, he had advised the appellant as follows: "I told her

that the best thing, if she had anything to do with it, was to go ahead and get it off her chest; that sometimes people did things for various reasons; sometimes it's self-defense -- just various reasons, and whatever she told me I'd be willing to present it to the court."

Code Ann. § 38-411 states that, for a confession to be admissible, "it must have been made voluntarily, without being induced by another by the hope of benefit or remotest fear of injury." Code Ann. § 38-412 provides that "the fact that a confession shall have been made under a spiritual exhortation or a promise of collateral benefit, shall not exclude it." "Pursuant to Code Ann. § 38-412 a confession made on promise of 'collateral benefit' is not inadmissible. We find that a hope of lighter punishment...is usually the 'hope of benefit' to which Code Ann. § 38-411 refers..." Presnell v. State, 241 Ga. 49, 55 (243 SE2d 495) (1978), reversed on other grounds in 439 U. S. 14 (99 SC 235), 58 LE2d 207) (1979). For an officer to advise an accused that it is always best to tell the truth will not, without more, render a subsequent confession inadmissible under Code Ann. § 38-411. Watkins v. State, 199 Ga. 81 (33 SE2d 325) (1945). The state-

ment of the officer was not on its face an inducement or hope of lighter punishment. Therefore, this argument is without merit. See Presnell v. State, supra.

The appellant also urges that her statement was involuntary, because the GBI agent threatened to cut off any insurance payments being made to her under the victim's insurance policy if she did not make a statement. The appellant raises this objection to the admission of her statement for the first time on appeal.

At the time the state sought to introduce the appellant's confession in evidence, the trial court conducted a Jackson v. Denno hearing to determine the voluntariness of the statement. At this hearing, the GBI agent testified that he had not threatened or coerced the appellant on any of the three occasions he had questioned her; that the appellant had come willingly to the sheriff's office to talk to him on the day she made the statement in question; that the appellant refused to talk about the first two illnesses of the victim, but had admitted that she put the pesticide in the victim's food on the night of his death and had given a written statement to that effect. The state also introduced testimony that, at the time the appellant made the statement, she was not under the influence of any type of alcohol or

drugs, that she had waived the presence of an attorney, and that she had signed a waiver-of-rights form. The appellant did not testify at the Jackson v. Denno hearing, nor did she object to the admission of her confession on the ground that the GBI agent had threatened her. The trial court concluded that the appellant had voluntarily chosen to make the confession, and admitted it in evidence.

After the prosecution rested, the appellant took the stand in her own behalf. On cross-examination, she alleged, for the first time, that the GBI agent had threatened to cut off payment from the victim's insurance policy in order to exact a statement from her.

On re-direct examination the appellant's counsel did not elicit further information from the appellant concerning the alleged threat, nor did he ask the trial court to re-evaluate its determination that the confession had been voluntarily made in light of this new information.

At one point the trial court cautioned the appellant's counsel not to focus his re-direct examination on questions he had already asked the appellant on direct, but suggested to counsel that if there was "anything new" that the state had

"brought out...you might want to redirect on [that]." The appellant's counsel responded that he had no further questions of the appellant.

At the close of all the evidence, the trial court charged the jury that they must make an independent determination that the confession was voluntary before they considered it.

The state is required only to prove by a preponderance of the evidence that the appellant's statement was voluntarily made. Lego v. Twomey, 404 U. S. 477 (92 SC 619, 30 LE2d 618) (1971); Pierce v. State, 235 Ga. 237 (219 SE2d 153) (1975). The state met that burden in this case. We must accept the trial court's determination that the appellant's statement was voluntarily made absent a showing that this determination was clearly erroneous. See Lego v. Twomey, supra; Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980); Pierce v. State, supra. A careful review of the record reveals that the decision of the trial judge in favor of admissibility was neither clearly erroneous nor an abuse of discretion.

3. The trial court charged the jury as to two aggravating circumstances: (1) that the offender committed the offense of murder for herself or another for the purpose of receiving money

or other things of monetary value. Code Ann. § 27-2534.1(b)(4), and (2) that the offense of murder was outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7). The jury returned with a written finding of the aggravating circumstance of "inhuman torture."

The appellant contends that the jury finding was incomplete under Code Ann. § 27-2534.1(b)(7) and that such a finding could be so broadly construed as to allow the death penalty to be imposed at random in murder cases where it is not intended to be imposed.

"The phrases 'outrageously or wantonly vile, horrible or inhuman' are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed." Hance v. State, supra, at 861. See also Godfrey v. Georgia, 446 U. S. (100 SC 1759, LE2d) (1980).

This court has recently held that Code Ann. § 27-2534(b)(7) "consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was out-

rageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated batter [sic] to the victim, (B) torture to the v tim, or (C) depravity of mind of the defendant." Hance, supra, at 860. As we held in Fair v. State, 245 Ga. 863 (268 SE2d 316) (1980), Code Ann. § 27-2534.1(b)(7) is worded in the disjunctive rather than the conjunctive. It is not required that the trier of fact find the existence of each disjunctive phrase of the statute. It must be shown simply that the evidence is "sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component, as hereinafter set forth." Hance, supra, at 861.

In this case, the jury returned a verdict which, although not containing all of the explanatory language of Code Ann. § 27-2534.1(b)(7), was sufficient to satisfy each major component of statutory aggravating circumstance seven, to wit: "inhuman" (component I) and "torture" (component IIB). Therefore, the jury's verdict constituted a complete finding of the specific and necessary elements of the statutory aggravating circumstance in question.

Where the aggravating circumstance is both specific and authorized by the evidence in a case, it does not permit the

"random imposition" of the death penalty. See Hance v. State, supra.

Review of the actual application of the statutory aggravating circumstance to the evidence in the case is a matter which will be taken up in the sentence-review division of this opinion.

Sentence Review.

As mandated by the statute, Ga. L. 1973, pp. 159, 165 (Code Ann. § 27-2537), we have reviewed the transcript and record in this case as we have in all prior cases under this statute. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

As noted above, the jury found as the aggravating circumstance, "inhuman torture." Code Ann. § 27-2534.1(b)(7).

Under the evidence in this case, the jury could believe that the victim was poisoned by the appellant on three separate occasions. On each occasion, the victim exhibited symptoms of a painful, burning abdomen, dizziness, weakness, sweating, vomiting and diarrhea. On one occasion, he went into convulsions and had to be placed upon a respirator. In each of the first two instances, the victim fully recovered before being poisoned

again. The appellant was present and witnessed the agony that her husband suffered on each of these three occasions. The initial two incidents of poisoning constituted serious physical abuse prior to the final and fatal poisoning. Torture occurs when the victim is subjected to serious physical abuse prior to death. Hance v. State, supra, at 861. The jury was authorized to find that acts of the appellant resulted in torture of the victim.

The murder was "inhuman" and, in that regard, this murder is distinguishable from "ordinary" murders in which the death penalty is not appropriate. The victim was not killed instantaneously, but was subjected to serious physical abuse over a one-month period. While the appellant stated that her motive for killing her husband was fear that he would hurt her son, as he had beaten him in the past, the child testified that his father had hit him only twice. There was no evidence to show that the victim was in any manner subjecting the appellant to emotional trauma at the time of the poisonings nor was he in any manner threatening to hurt the appellant or her child. The appellant, furthermore, showed no remorse for the killing, and attempted to conceal the crime. While this is a domestic case,

"[t]he statute does not forbid imposition of the death penalty upon marital murderers; it merely requires that [a] statutory aggravating [circumstance] exist[s]." Dix v. State, 238 Ga. 209, 216 (232 SE2d 47) (1977).

This case is distinguishable from the recent United States Supreme Court case of Godfrey v. Georgia, 446 U. S. (100 SC 1759, LE2d) (1980). In Godfrey, the victims were killed instantaneously, and had been subjecting the perpetrator to emotional trauma prior to the killing. In the instant case, the evidence shows a pattern of intentional poisonings to the extent that, in each instance, the victim was rendered totally incapacitated and was caused to suffer agonizing pain. Each time the victim recovered, he was poisoned again. The state introduced evidence tending to establish a motive of either the appellant's extra-marital affairs (she saw the alleged lover on the day of the funeral), or expected monetary gain from proceeds of an insurance policy on the victim's life.

We conclude that the evidence supports the finding of the aggravating circumstance and the sentence of death. It meets the standards required by Jackson v. Virginia, supra. We have

reviewed the instructions of the trial court during the sentencing phase of the trial, and find that the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1978) and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1978). In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. Although lesser sentences than death are frequently imposed in domestic murder cases, it does not follow that the death penalty would not be authorized for the murder of one spouse by another under any circumstances. Dix v. State, supra, at 216. Some of the more vile, horrible or inhuman homicides have been perpetrated by family members against one another. We find that the similar domestic murder cases listed in the appendix support the affirmance of the death penalty. The appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Gregory, J., not participating.

APPENDIX

Jackson v. State, 229 Ga. 191 (190 SE2d 530) (1972);

Sirmans v. State, 229 Ga. 743 (194 SE2d 476) (1972;

Morgan v. State, 231 Ga. 280 (201 SE2d 468) (1973);

Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976);

Dix v. State, 238 Ga. 209 (232 SE2d 47) (1976);

Alderman v. State, 241 Ga. 496 (246 SE2d 642) (1978).

APPENDIX B

This case involves the following provisions of the Code of Georgia:

Ga. Code Ann. §6-805

> Preparation of record for appeal; reporting of evidence and other matters; when narrative form used
>
> (a) In all felony cases, the transcript of evidence and proceedings shall be reported and prepared as provided in Code section 27-2401, or as may hereafter be provided by law.
>
> * * *
>
> (d) Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, all evidence -- whether admitted or stricken on objection or otherwise -- copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called in question on appeal or other post-trial procedure shall be reported, and where the report is transcribed, all such matter shall be included in the written transcript, it being the intention of this law that all these matters appear in the record, rather than in assignments of error on appeal or otherwise, which are abolished by this law. Where matters occur which were not reported, such as objections to oral argument, misconduct of the jury, or other like instances, the court, upon motion of either party, shall require that a transcript of these matters be made and included as a part of the record. The transcript of proceedings shall not be reduced to narrative form unless by agreement of counsel, but where the trial is not reported or the transcript of the proceedings for any other reason is not available, and the evidence is prepared from recollection, it may be prepared in narrative form.
>
> * * *
>
> (j) In all cases, civil or criminal, any party may as a matter of right have the case reported at his own expense.

Ga. Code Ann. §26-1101

> (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

Ga. Code Ann. §26-3102

Capital offenses; jury verdict and sentence

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

Ga. Code Ann. §27-2503

Presentence hearings in felony cases

(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, reqarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the

court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits presecribed by law.

Ga. Code Ann. §27-2534.1

Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . . .

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value . . .

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Ga. Code Ann. §27-2537

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor,

* * *

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Ga. Code Ann. §27-2206

Counsel prohibited from arguing possibility of executive clemency; mistrial for violation of rule

No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency. If counsel for either side in a criminal case should so argue to the jury, opposing counsel shall have the right to immediately request the court to declare a mistrial; and in which case, it shall be mandatory upon the court to declare a mistrial; and upon failure to do so, same shall constitute reversible error.

This section shall be construed as setting forth regulations in addition to those provided for in section 24-3319 and section 81-1009.

Ga. Code Ann. §27-2401

On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel.

APPENDIX C

IN THE SUPERIOR COURT OF PIKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

V.

SHIRLEY TYLER

CRIMINAL INDICTMENT NO. _____

PETITION FOR PSYCHIATRIC EXAMINATION

COMES NOW Bishoff and Hearn, Attorney for defendant above named before arraignment and shows the Court the following:

1. Defendant is indigent and without funds to pay the expenses of his defense, wherefore the above named attorney has been appointed to represent him.

2. Defendant's attorney has reason to believe that his client is suffering from some mental disease, injury on congenital deficiency which could render client incapable of assisting in preparing a defense and standing trial.

3. Attorney further believes client may be incapable of intelligently pleading to the merits of his case.

WHEREFORE, counsel prays that an order issue allowing the defendant to be examined at the Pike County Jail by a competent psychiatrist and that a report of such examination be submitted to the Court, Attorney for Defendant, and the District Attorney. It is further prayed that the psychiatrist address his attention to the following questions, to-wit:

(a) Whether or not defendant is capable of understanding the nature of the charges against him;

(b) Whether or not defendant understands the object of the proceedings going for or against him;

(c) Whether or not defendant rightly comprehends his own condition in reference to such proceedings;

BISHOFF & HEARN
ATTORNEYS AT LAW
106 NORTH CHURCH STREET
THOMASTON, GEORGIA
30286
(404) 647-8811

(d) Whether or not defendant is capable of rendering his attorney such assistance as needed in order to prepare a proper defense to the indictment preferred against him.

Defendant further prays that the psychiatrist be required to determine and report his opinion as to the defendant's condition at the time of the alleged crime with respect to the following principles of law:

1. 26-702. Mental capacity; insanity. -- A person shall not be found guilty of a crime, if at the time of the act, omission, or negligence constituting the crime, such person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence. (Acts 1968, pp. 1249, 1270).

2. 26-703. Delusional compulsion. -- A person shall not be found guilty of a crime when at the time of the act, omission, or negligence constituting the crime, such person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime. (Acts 1968, pp. 1249, 1270.)

3. 26-704. Intoxication. -- A person shall not be found guilty of a crime when at the time of the act, omission, or negligence constituting the crime, such person, because of involuntary intoxication, did not have sufficient mental capacity to distinguish between right and wrong in relation to such act. Involuntary intoxication means intoxication caused (a) by consumption of a substance through excusable ignorance and (b) by the coercion, fraud, artifice, or contrivance of another person. Voluntary intoxication shall not be an excuse for any criminal act or omission. (Acts 1968, pp. 1249, 1270).

4. 26-705. Mistake of fact. --A person shall not be found guilty of a crime if the act or omission to act constituting the crime was induced by misapprehension of fact, which, if true, would have justified the act or omission. (Acts 1968, pp. 1249; 1969, pp. 857, 859).

And for other relief as this Honorable Court may deem mete and proper.

BISHOFF & HEARN
ATTORNEYS AT LAW
106 NORTH CHURCH STREET
THOMASTON, GEORGIA
30286
(404) 647-8511

Respectfully submitted,
Law Offices of Bishoff and Hearn
Attorneys for Defendant

_____

For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the District Attorney with a copy of this pleading.

This ____ day of _____, 1979.

_____

Attorney for Defendant

BISHOFF & HEARN
ATTORNEYS AT LAW
108 NORTH CHURCH STREET
THOMASTON, GEORGIA
30286
(404) 647-8811

APPENDIX D

IN THE SUPERIOR COURT OF PIKE COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA

V.

SHIRLEY TYLER

CRIMINAL INDICTMENT NO. _____

MOTION FOR COMPLETE RECORDATION OF ALL PROCEEDINGS

NOW COMES the Defendant in the above styled case and moves the Court for an order directing the court reporter to take down and record opening statements, closing arguments, all testimony and each and every proceeding involved in pre-trial and trial in the above stated case.

This _____ day of _____, 1979.

Respectfully submitted,

_____

Attorney for Defendant

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served the District Attorney with a copy of this pleading.

This _____ day of _____, 1979.

_____

Attorney for Defendant

BISHOFF & HEARN
ATTORNEYS AT LAW
108 NORTH CHURCH STREET
THOMASTON, GEORGIA
30286
(404) 647-5011

FILED
MAY 11 1981
Alexander L. Stevas, Clerk

80-6671

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

SHIRLEY TYLER,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Upon the annexed affidavit of petitioner, SHIRLEY TYLER, and her attorney, URSULA BENTELE, petitioner asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Ursula Bentele

Ursula Bentele
165 West End Avenue
New York, New York 10023

Attorney for Petitioner

RECEIVED
MAY 13 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

SHIRLEY TYLER,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, SHIRLEY TYLER, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Aug 1979

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No X

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No X

   a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None_____

Tony 14, Delta 10, Teresa 8

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Shirley Tyler

SHIRLEY TYLER

STATE OF GEORGIA
COUNTY OF Pike

SUBSCRIBED AND SWORN TO
before me this the 21st day of March, 1981.

Richard H Bischoff

My Commission expires:

June 25, 1983

NO. 80-6671

RECEIVED
JUN 8 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

SHIRLEY TYLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM B. HILL, JR.
Assistant Attorney General
Counsel for the Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-2976

QUESTIONS PRESENTED

1.

Whether Petitioner's contention that the state trial court committed error of a constitutional magnitude by denying her request for a psychiatric evaluation is properly presented for the first time here on this petition?

2.

Whether Petitioner's contention that she was rendered the ineffective assistance of counsel in that her defense attorney failed to present evidence of Petitioner's lack of a prior criminal record as a mitigating factor, is properly presented for the first time here on this petition?

3.

Whether Petitioner's contention that the trial court should have sua sponte defined each of the words which comprise Ga. Code Ann. § 27-2534.1(b)7 and the term "mitigating circumstances" is properly presented for the first time here on this petition?

4.

Whether, contrary to Petitioner's contentions, under the facts of this instant case Petitioner's sentence of death constitutes cruel and unusual punishment?

5.

Whether Petitioner's contention that she was deprived of the due process of law by operation of Ga. Code Ann. § 6-805(d), which code section provides that argument of counsel shall be transcribed upon motion of either party upon objection to oral argument, is properly raised for the first time here on this instant petition?

Whether Petitioner's contention that her sentence of death was imposed in an arbitrary fashion under the influence of passion and prejudice occasioned by alleged improper remarks made by the district attorney is properly presented to this Court for the first time on this petition for a writ of certiorari?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
REASONS FOR NOT GRANTING THE WRIT	
A. PETITIONER'S CONTENTION THAT THE STATE TRIAL COURT COMMITTED ERROR OF A CONSTITUTIONAL MAGNITUDE BY DENYING HER REQUEST FOR A PSYCHIATRIC EVALUATION IS IMPROPERLY PRESENTED FOR THE FIRST TIME HERE ON THIS PETITION. . . .	2
B. PETITIONER'S CONTENTION THAT SHE WAS RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT HER DEFENSE ATTORNEY FAILED TO PRESENT EVIDENCE OF PETITIONER'S LACK OF A PRIOR CRIMINAL RECORD AS A MITIGATING FACTOR, IS IMPROPERLY PRESENTED FOR THE FIRST TIME HERE ON THIS PETITION. . . .	4
C. PETITIONER'S CONTENTION THAT THE TRIAL COURT SHOULD HAVE SUA SPONTE DEFINED EACH OF THE WORDS WHICH COMPRISED GA. CODE ANN. § 27-2534.1(b)7 AND THE TERM "MITIGATING CIRCUMSTANCES" IS IMPROPERLY PRESENTED FOR THE FIRST TIME HERE ON THIS PETITION	5
D. CONTRARY TO PETITIONER'S CONTENTIONS, UNDER THE FACTS OF THIS INSTANT CASE PETITIONER'S SENTENCE OF DEATH DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT	6
E. PETITIONER'S CONTENTION THAT SHE WAS DEPRIVED OF THE DUE PROCESS OF LAW BY OPERATION OF GA. CODE ANN. § 6-805(d), WHICH CODE SECTION PROVIDES THAT ARGUMENT OF COUNSEL SHALL BE TRANSCRIBED UPON MOTION OF EITHER PARTY UPON OBJECTION TO ORAL ARGUMENT, IS IMPROPERLY RAISED FOR THE FIRST TIME HERE ON THIS INSTANT PETITION . . .	8
F. PETITIONER'S CONTENTION THAT HER SENTENCE OF DEATH WAS IMPOSED IN AN ARBITRARY FASHION UNDER THE INFLUENCE OF PASSION AND PREJUDICE OCCASIONED BY ALLEGED IMPROPER REMARKS MADE BY THE DISTRICT ATTORNEY IS IMPROPERLY PRESENTED TO THIS COURT FOR THE FIRST TIME ON THIS PETITION FOR A WRIT OF CERTIORARI.	10
CONCLUSION.	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

CASES CITED:	PAGE(S)
Berger v. United States, 295 U.S. 78 (1935)	10
Cardinale v. Louisiana, 394 U.S. 437 (1969)	2, 3, 4, 5, 9, 10
Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir. 1979)	10
Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979).	9
Godfrey v. Georgia, 446 U.S. 420 (1980)	7, 8
Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980).	7
Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978)	9
Tyler v. State, 247 Ga. 119, ___S.E.2d___(1980) . .	1

STATUTES CITED:	
Ga. Code Ann. § 6-805(d)	8
Ga. Code Ann. § 27-2534.1(b)7	5, 6, 8

NO. 80-6671

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SHIRLEY TYLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

(i)

Petitioner seeks to have this Court review the decision of the Supreme Court of Georgia in Tyler v. State, 247 Ga. 119, ___S.E.2d___ (1980), rendered on February 11, 1981, affirming Petitioner's conviction for murder and resulting sentence of death.[1/] No motion for a rehearing was filed on Petitioner's behalf.

1/ A copy of the decision of the Supreme Court of Georgia is attached hereto as Respondent's Exhibit I.

From the affirmation of her conviction and sentence, Petitioner has pursued this instant petition for a writ of certiorari to be directed to the Supreme Court of Georgia.

STATEMENT OF FACTS

The facts of this case are adequately set forth in the attached copy of the Supreme Court of Georgia's opinion, Respondent's Exhibit I, and the same are incorporated as if fully set forth herein.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. PETITIONER'S CONTENTION THAT THE STATE TRIAL COURT COMMITTED ERROR OF A CONSTITUTIONAL MAGNITUDE BY DENYING HER REQUEST FOR A PSYCHIATRIC EVALUATION IS IMPROPERLY PRESENTED FOR THE FIRST TIME HERE ON THIS PETITION. (Contention No. 1).

On this petition for a writ of certiorari Petitioner, for the first time, contends that the State trial court committed error of a constitutional magnitude by denying her request for a psychiatric evaluation. With reference to Petitioner's attempt to present this new issue to this Court for review, Respondent notes that in Cardinale v. Louisiana, 394 U.S. 437 (1969), this Court clearly stated that it would not consider constitutional issues presented to it which had

not first been squarely presented to, and passed upon by the state courts below.

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not consider federal constitutional issues raised here for the first time on review of state court decisions." Id., at 438.

As is revealed by an examination of Respondent's Exhibit I, this instant issue has never been presented to, or ruled upon by the Supreme Court of Georgia. Because this issue has never been raised in the state courts below, the record in this case has not been compiled with this issue in mind and is thus not sufficient to support an inquiry into the same. Accordingly, this issue cannot serve as the basis for the granting of the requested writ. Cardinale, supra.

B. PETITIONER'S CONTENTION THAT SHE WAS RENDERED THE INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT HER DEFENSE ATTORNEY FAILED TO PRESENT EVIDENCE OF PETITIONER'S LACK OF A PRIOR CRIMINAL RECORD AS A MITIGATING FACTOR, IS IMPROPERLY PRESENTED FOR THE FIRST TIME HERE ON THIS PETITION. (Contention No. 2).

On this contention Petitioner alleges that her trial attorney's failure to present evidence of her [Petitioner's] alleged lack of a prior criminal record rendered defense counsel's entire representation at trial ineffective. This assertion assumes of course that Petitioner possesses no prior criminal record.

In the alternative Petitioner also alleges that the trial court should have specifically charged, sua sponte, that Petitioner lacked a criminal record and that the same in fact constituted a mitigating factor. Again this assertion assumes, without supporting evidence in the record, that Petitioner lacked a prior criminal record.

The allegations set forth in this instant contention are all raised for the first time on this petition for a writ of certiorari. For the reasons set forth in the preceding portion of this brief this contention cannot serve as the basis for the granting of the requested writ. Cardinale v. Louisiana, 394 U.S. 437 (1969).

C. PETITIONER'S CONTENTION THAT THE TRIAL COURT SHOULD HAVE SUA SPONTE DEFINED EACH OF THE WORDS WHICH COMPRISED GA. CODE ANN. § 27-2534.1 (b) 7 AND THE TERM "MITIGATING CIRCUMSTANCES" IS IMPROPERLY PRESENTED FOR THE FIRST TIME HERE ON THIS PETITION. (Contention No. 3).

At page 17 of this instant petition for a writ of certiorari the Petitioner, referring to Ga. Code Ann. § 27-2534.1 (b) 7, for the first time, alleges that "[n]one of the terms used in this statutory provision was defined for petitioner's jury."[2/] This contention is improperly raised for the first time here on this petition thus presenting nothing for review by this Court, and therefore cannot serve as the basis for granting the requested writ. Cardinale v. Louisiana, 394 U.S. 437 (1969).

2/ Ga. Code Ann. § 27-2534.1(b) 7 provides in pertinent part as follows:

> "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

D. CONTRARY TO PETITIONER'S CONTENTIONS, UNDER THE FACTS OF THIS INSTANT CASE PETITIONER'S SENTENCE OF DEATH DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT. (Contention No. 4).

At page 17 of her petition for a writ of certiorari, Petitioner contends that the imposition of her sentence of death pursuant to a finding of the statutory aggravating circumstance as set forth in Ga. Code Ann. § 27-2534.1(b)7, constitutes cruel and unusual punishment. Petitioner argues that she should not be subjected to the death penalty merely because she had access only to an extremely deadly slow acting poison which she administered to the victim on three separate occasions, as opposed to a pistol, rifle, or shotgun. In this regard Petitioner rhetorically asks:

> "Was not the poison simply the means that happened to be at hand and within petitioner's capacity, physically and perhaps psychologically, to employ? If such is the case, surely petitioner should not be exposed to the death penatly because she did not have access to a gun to do the job effectively and quickly." (Petitioner's Brief at 18).

In this instant case, on Sentence Review, the Supreme Court of Georgia ascertained that the evidence revealed that the victim was poisoned by the Petitioner on three separate occasions. On each occasion the victim exhibited symptoms of a painful, burning abdomen, dizziness, weakness, sweating, vomiting, and diarrhea. On one occasion the victim went into convulsions and had to be placed upon a respirator. In each of

the first two instances the victim fully recovered before being poisoned again by the Petitioner. The evidence further revealed that the Petitioner was always present and witnessed the agony that her husband suffered on each of these three occasions.

The Surpeme Court of Georgia correctly concluded that the initial two instances of poisoning by the Petitioner constituted torture and serious physical abuse prior to the final and fatal poisoning. As noted by the Supreme Court of Georgia in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), torture occurs when the victim is subjected to serious physical abuse prior to death. Accord, Godfrey v. Georgia, 446 U.S. 420 (1980).

In this instant case the evidence further revealed that the murder was "inhuman" and, in that regard, distinguishable from "ordinary" murders in which the death penatly is not appropriate. The victim [Petitioner's husband] was not killed instantaneously, but was subjected to serious physical abuse over a one month period. While at trial Petitioner testified that her motive for killing her husband was fear that he would hurt her son, the child testified that his father had hit him only twice. At trial there was no evidence that the victim was in any manner subjecting the Petitioner to emotional trauma at the time of the poisoning nor was there evidence that the victim was in any manner threatening to do harm to the Petitioner or to her child. Furthermore, the Petitioner has shown no remorse for the killing, but in fact attempted to conceal the crime.

On Sentence Review, the Supreme Court of Georgia further noted that this instant case is distinguishable from this Court's

decision in Godfrey v. Georgia, supra. In Godfrey, supra, the victims were killed instantaneously and had been subjecting the perpetrator to emotional trauma prior to the killing. In this instant case the evidence clearly demonstrated a pattern of intentional poisonings of the victim to the extent that, in each instance, the victim was rendered totally incapacitated and was caused to suffer agonizing pain. Each time the victim recovered the Petitioner poisoned him again. The State further introduced evidence tending to establish a motive of either the Petitioner's extramarital affairs, or expected monetary gain from proceeds of an insurance policy on the victim's life.

As is clearly evident upon an examination of the facts of this instant case, the evidence presented at trial amply supports the finding of the aggravated circumstance as set forth in Ga. Code Ann. § 27-2534.1(b)7, and the jury's recommendation of death as punishment. Petitioner's contentions to the contrary are clearly without merit.

E. PETITIONER'S CONTENTION THAT SHE WAS DEPRIVED OF THE DUE PROCESS OF LAW BY OPERATION OF GA. CODE ANN. § 6-805(d), WHICH CODE SECTION PROVIDES THAT ARGUMENT OF COUNSEL SHALL BE TRANSCRIBED UPON MOTION OF EITHER PARTY UPON OBJECTION TO ORAL ARGUMENT, IS IMPROPERLY RAISED FOR THE FIRST TIME HERE ON THIS INSTANT PETITION.
(Contention No. 5).

For the first time here on this petition for a writ of certiorari Petitioner contends that she was denied the due

process of law because opening statements and closing arguments of counsel on the guilt/innocence phase of the trial were not transcribed. For those reasons set forth in the preceding portions of this Brief, this contention cannot serve as the basis for the granting of the requested writ of certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Further, Petitioner does not contend that any prejudicial remarks were made during the opening statement or closing argument by the district attorney, as in fact an examination of the trial transcript reveals that the only objection made was by the district attorney to a remark by counsel for the defendant. (T. 297-298). On numerous occasions the Supreme Court of Georgia has addressed this instant allegation stating that absent the demonstration by the defendant of some resulting harm, the failure to transcribe opening statements and closing arguments of counsel does not automatically require the vacating of a death sentence. Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979); Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978).

Accordingly, for all of the above and foregoing reasons this contention cannot serve as the basis for the granting of the requested writ of certiorari.

F. PETITIONER'S CONTENTION THAT HER SENTENCE OF DEATH WAS IMPOSED IN AN ARBITRARY FASHION UNDER THE INFLUENCE OF PASSION AND PREJUDICE OCCASIONED BY ALLEGED IMPROPER REMARKS MADE BY THE DISTRICT ATTORNEY IS IMPROPERLY PRESENTED TO THIS COURT FOR THE FIRST TIME ON THIS PETITION FOR A WRIT OF CERTIORARI.
(Contention No. 6).

Here on this petition for a writ of certiorari Petitioner, for the first time, contends that her sentence of death was arbitrarily imposed under the influence of passion and prejudice occasioned by alleged improper statements made by the district attorney during his argument at the conclusion of the penalty phase of the trial. For those reasons set forth in the preceding portions of this Brief this contention cannot serve as the basis for the granting of the requested writ of certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Further, Respondent notes that the proper perspective from which to view an allegation that alleged improper statements by the district attorney marred a defendant's trial, is in the context of the entire trial. In Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir. 1979), with reference to prosectorial remarks, the court stated that:

> "'[A] defect of constitutional proportions is not to be found in any but egregious cases.'" Id., at 251. Accord Berger v. United States, 295 U.S. 78 (1935).

For all of the above and foregoing reasons, this contention cannot serve as the basis for the granting of the requested writ of certiorari.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented, and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

WILLIAM B. HILL, JR.
Assistant Attorney General
Counsel for the Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-2976

William B. Hill, J

3

In the Supreme Court of Georgia

Decided: FEB 11 1981

36671. TYLER v. THE STATE.

MARSHALL, Justice.

This is a death case. The appellant, Shirley Tyler, was convicted of the murder of her husband by a Pike County jury. The jury found one aggravating circumstance and sentenced the appellant to death. The case is before us on direct appeal and for mandatory review of the death sentence.

The evidence presented at trial follows:

The appellant and the victim lived next door to the victim's father, William Tyler. On September 18, 1979, the appellant sent her son to William Tyler's home to inform the victim's parents that the victim was seriously ill. Going next door, William Tyler found his son lying face down on the floor of his bedroom. The victim was wet with perspiration, calling for ice water and requesting that a fan be turned on him. William Tyler testified that his son was foaming at the mouth and attempting to vomit, that he could not control his bowels, and was complaining of a burning abdominal pain. The victim

was unable to stand or to otherwise control his muscles. and he had to be carried to the car which transported him to the hospital. There, the victim's condition was diagnosed as a viral infection. He stayed in the hospital for a few days and then returned to work upon release.

On October 3, 1979, the victim's son again informed William Tyler that the victim was ill. Upon investigation, William Tyler discovered the victim lying on the floor, complaining of the same symptoms he had exhibited before. The victim was again admitted to the hospital, where this time his illness was diagnosed as a cerebral hemorrhage. However, neurological tests proved this diagnosis to be inaccurate. After a few days in the hospital, the convulsive seizures which the victim had initially experienced subsided. Headache and high-blood-pressure medications were prescribed, and the victim was released. At trial, the victim's attending physician testified that, within a week of the victim's release from the hospital, he exhibited few of the debilitating symptoms. However, the victim was not well enough to return to work.

On October 22, 1979, in the presence of William Tyler, the victim ate a large bowl of chili, which the appellant had

prepared. Approximately an hour later, the victim staggered over to his father's home, exhibiting symptoms identical to those displayed on the two previous occasions. The victim died en route to the hospital.

An autopsy disclosed that the victim died from a fatal ingestion of the chemical parathion. Subsequently, the attending physician inquired of the appellant whether the victim had come in contact with any poison or chemical. The appellant replied that he had not. Upon further inquiry, the appellant stated that the victim's mother had given them some rat poison marketed under the brand name Phoskil. Parathion is the active ingredient in Phoskil.

Expert testimony presented at trial showed that parathion is a toxic pesticide not recommended for use in households. The fatal dose of parathion is approximately half of one teaspoon. The poison can either be ingested or inhaled or it may even enter the body through the skin.

The chemical had been sprinkled around the victim's house as a pesticide. Two of the victim's children were tested and found to have an almost negative amount of parathion in their bodies. Expert testimony illustrated that it is possible, but

unlikely, for a human to ingest a fatal dose of parathion through the skin.

When initially interviewed by authorities, the appellant stated that the victim probably came in contact with the poison by rolling around on the floor. She admitted in these initial interviews that the victim had eaten shortly before each attack. In a third interview, which occurred in the sheriff's office prior to arrest, the appellant admitted that she had scraped a spoonful of poison out of the cabinet drawer and had mixed it with the chili that the victim had eaten immediately prior to his death. She stated that her motive for killing her husband was to prevent him from hurting her son. Testimony from the appellant's son showed that the victim had hit the child only twice; once "a long time ago" and again on the night of his death. The state also presented evidence that the appellant had been, from time to time, involved with another male, and, in fact, had been out with him on the day of her husband's funeral.

The appellant admitted to investigators that her husband had a life insurance policy, but stated that the value of the policy was only $500. It was later determined by GBI investi-

gators that the actual value of the policy was $15,000.

At trial, the appellant testified that the victim had been despondent and had administered the poison to himself by mixing it in a glass of orange juice. The appellant stated that the victim believed himself to be invincible and was prone to eating glass and other harmful objects to illustrate this belief.

The victim apparently had been in good health prior to this series of illnesses. The state presented testimony by both the victim's doctor and family that the victim appeared normal, had not been dejected, and had been generally in good spirits with the exception of these recurring illnesses.

Other evidence will be examined in more detail in addressing each of the appellant's enumerations of error.

1. The appellant first urges the general grounds. We find that the evidence in this case supports the conclusion that a rational trier of fact could find the appellant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). Therefore, this enumeration is without merit.

2. Next, the appellant argues that she did not freely and voluntarily make the statement in which she confessed to

poisoning her husband.

As stated above, the appellant was interviewed on three separate occasions. On the first occasion, the authorities were merely attempting to determine how the victim came in contact with the poison. At this time, the appellant made no incriminating statements. During the second interview, the authorities focused their investigation upon the appellant, and advised her of her constitutional rights. The appellant made no incriminating statements on this occasion. On the third occasion, the GBI agent investigating the case advised the appellant of her rights; subsequently, the appellant signed a waiver form. At this time, she made a written statement, to wit: "Yes, I did it. He was going to hurt my son, Tony, and I'll not stand for this, because he hurt him once before, and I gave him a little teaspoon in his chili and beans. His mother put it in a drawer and I scraped a little of this out of the drawer." The appellant's attorney objected to the introduction of this statement, arguing that it was inadmissible in that it was the result of a promise of a benefit or a hope of reward. We do not agree.

At trial, the GBI agent testified that, during the third interview, he had advised the appellant as follows: "I told her

that the best thing, if she had anything to do with it, was to go ahead and get it off her chest; that sometimes people did things for various reasons; sometimes it's self-defense -- just various reasons, and whatever she told me I'd be willing to present it to the court."

Code Ann. § 38-411 states that, for a confession to be admissible, "it must have been made voluntarily, without being induced by another by the hope of benefit or remotest fear of injury." Code Ann. § 38-412 provides that "the fact that a confession shall have been made under a spiritual exhortation or a promise of collateral benefit, shall not exclude it." "Pursuant to Code Ann. § 38-412 a confession made on promise of 'collateral benefit' is not inadmissible. We find that a hope of lighter punishment...is usually the 'hope of benefit' to which Code Ann. § 38-411 refers..." Presnell v. State, 241 Ga. 49, 55 (243 SE2d 495) (1978), reversed on other grounds in 439 U. S. 14 (99 SC 235), 58 LE2d 207) (1979). For an officer to advise an accused that it is always best to tell the truth will not, without more, render a subsequent confession inadmissible under Code Ann. § 38-411. Watkins v. State, 199 Ga. 81 (33 SE2d 325) (1945). The state-

ment of the officer was not on its face an inducement or hope of lighter punishment. Therefore, this argument is without merit. See Presnell v. State, supra.

The appellant also urges that her statement was involuntary, because the GBI agent threatened to cut off any insurance payments being made to her under the victim's insurance policy if she did not make a statement. The appellant raises this objection to the admission of her statement for the first time on appeal.

At the time the state sought to introduce the appellant's confession in evidence, the trial court conducted a Jackson v. Denno hearing to determine the voluntariness of the statement. At this hearing, the GBI agent testified that he had not threatened or coerced the appellant on any of the three occasions he had questioned her; that the appellant had come willingly to the sheriff's office to talk to him on the day she made the statement in question; that the appellant refused to talk about the first two illnesses of the victim, but had admitted that she put the pesticide in the victim's food on the night of his death and had given a written statement to that effect. The state also introduced testimony that, at the time the appellant made the statement, she was not under the influence of any type of alcohol or

drugs, that she had waived the presence of an attorney, and that she had signed a waiver-of-rights form. The appellant did not testify at the Jackson v. Denno hearing, nor did she object to the admission of her confession on the ground that the GBI agent had threatened her. The trial court concluded that the appellant had voluntarily chosen to make the confession, and admitted it in evidence.

After the prosecution rested, the appellant took the stand in her own behalf. On cross-examination, she alleged, for the first time, that the GBI agent had threatened to cut off payment from the victim's insurance policy in order to exact a statement from her.

On re-direct examination the appellant's counsel did not elicit further information from the appellant concerning the alleged threat, nor did he ask the trial court to re-evaluate its determination that the confession had been voluntarily made in light of this new information.

At one point the trial court cautioned the appellant's counsel not to focus his re-direct examination on questions he had already asked the appellant on direct, but suggested to counsel that if there was "anything new" that the state had

"brought out...you might want to redirect on [that]." The appellant's counsel responded that he had no further questions of the appellant.

At the close of all the evidence, the trial court charged the jury that they must make an independent determination that the confession was voluntary before they considered it.

The state is required only to prove by a preponderance of the evidence that the appellant's statement was voluntarily made. Lego v. Twomey, 404 U. S. 477 (92 SC 619, 30 LE2d 618) (1971); Pierce v. State, 235 Ga. 237 (219 SE2d 158) (1975). The state met that burden in this case. We must accept the trial court's determination that the appellant's statement was voluntarily made absent a showing that this determination was clearly erroneous. See Lego v. Twomey, supra; Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980); Pierce v. State, supra. A careful review of the record reveals that the decision of the trial judge in favor of admissibility was neither clearly erroneous nor an abuse of discretion.

3. The trial court charged the jury as to two aggravating circumstances: (1) that the offender committed the offense of murder for herself or another for the purpose of receiving money

or other things of monetary value. Code Ann. § 27-2534.1(b)(4), and (2) that the offense of murder was outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7). The jury returned with a written finding of the aggravating circumstance of "inhuman torture."

The appellant contends that the jury finding was incomplete under Code Ann. § 27-2534.1(b)(7) and that such a finding could be so broadly construed as to allow the death penalty to be imposed at random in murder cases where it is not intended to be imposed.

"The phrases 'outrageously or wantonly vile, horrible or inhuman' are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed." Hance v. State, supra, at 861. See also Godfrey v. Georgia, 446 U. S. (100 SC 1759, LE2d) (1980).

This court has recently held that Code Ann. § 27-2534(b)(7) "consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was out-

rageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated batter [sic] to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant." Hance, supra, at 860. As we held in Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980), Code Ann. § 27-2534.1(b)(7) is worded in the disjunctive rather than the conjunctive. It is not required that the trier of fact find the existence of each disjunctive phrase of the statute. It must be shown simply that the evidence is "sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component, as hereinafter set forth." Hance, supra, at 861.

In this case, the jury returned a verdict which, although not containing all of the explanatory language of Code Ann. § 27-2534.1(b)(7), was sufficient to satisfy each major component of statutory aggravating circumstance seven, to wit: "inhuman" (component I) and "torture" (component IIB). Therefore, the jury's verdict constituted a complete finding of the specific and necessary elements of the statutory aggravating circumstance in question.

Where the aggravating circumstance is both specific and authorized by the evidence in a case, it does not permit the

"random imposition" of the death penalty. See Hance v. State, supra.

Review of the actual application of the statutory aggravating circumstance to the evidence in the case is a matter which will be taken up in the sentence-review division of this opinion.

Sentence Review.

As mandated by the statute, Ga. L. 1973, pp. 159, 165 (Code Ann. § 27-2537), we have reviewed the transcript and record in this case as we have in all prior cases under this statute. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

As noted above, the jury found as the aggravating circumstance, "inhuman torture." Code Ann. § 27-2534.1(b)(7).

Under the evidence in this case, the jury could believe that the victim was poisoned by the appellant on three separate occasions. On each occasion, the victim exhibited symptoms of a painful, burning abdomen, dizziness, weakness, sweating, vomiting and diarrhea. On one occasion, he went into convulsions and had to be placed upon a respirator. In each of the first two instances, the victim fully recovered before being poisoned

again. The appellant was present and witnessed the agony that her husband suffered on each of these three occasions. The initial two incidents of poisoning constituted serious physical abuse prior to the final and fatal poisoning. Torture occurs when the victim is subjected to serious physical abuse prior to death. Hance v. State, supra, at 861. The jury was authorized to find that acts of the appellant resulted in torture of the victim.

The murder was "inhuman" and, in that regard, this murder is distinguishable from "ordinary" murders in which the death penalty is not appropriate. The victim was not killed instantaneously, but was subjected to serious physical abuse over a one-month period. While the appellant stated that her motive for killing her husband was fear that he would hurt her son, as he had beaten him in the past, the child testified that his father had hit him only twice. There was no evidence to show that the victim was in any manner subjecting the appellant to emotional trauma at the time of the poisonings nor was he in any manner threatening to hurt the appellant or her child. The appellant, furthermore, showed no remorse for the killing, and attempted to conceal the crime. While this is a domestic case,

"[t]he statute does not forbid imposition of the death penalty upon marital murderers; it merely requires that [a] statutory aggravating [circumstance] exist[s]." Dix v. State, 238 Ga. 209, 216 (232 SE2d 47) (1977).

This case is distinguishable from the recent United States Supreme Court case of Godfrey v. Georgia, 446 U. S. (100 SC 1759, LE2d) (1980). In Godfrey, the victims were killed instantaneously, and had been subjecting the perpetrator to emotional trauma prior to the killing. In the instant case, the evidence shows a pattern of intentional poisonings to the extent that, in each instance, the victim was rendered totally incapacitated and was caused to suffer agonizing pain. Each time the victim recovered, he was poisoned again. The state introduced evidence tending to establish a motive of either the appellant's extra-marital affairs (she saw the alleged lover on the day of the funeral), or expected monetary gain from proceeds of an insurance policy on the victim's life.

We conclude that the evidence supports the finding of the aggravating circumstance and the sentence of death. It meets the standards required by Jackson v. Virginia, supra. We have

reviewed the instructions of the trial court during the sentencing phase of the trial, and find that the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1978) and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1978). In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. Although lesser sentences than death are frequently imposed in domestic murder cases, it does not follow that the death penalty would not be authorized for the murder of one spouse by another under any circumstances. Dix v. State, supra, at 216. Some of the more vile, horrible or inhuman homicides have been perpetrated by family members against one another. We find that the similar domestic murder cases listed in the appendix support the affirmance of the death penalty. The appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Gregory, J., not participating.

APPENDIX

Jackson v. State, 229 Ga. 191 (190 SE2d 530) (1972);

Sirmans v. State, 229 Ga. 743 (194 SE2d 476) (1972;

Morgan v. State, 231 Ga. 280 (201 SE2d 468) (1973);

Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976);

Dix v. State, 238 Ga. 209 (232 SE2d 47) (1976);

Alderman v. State, 241 Ga. 496 (246 SE2d 642) (1978).